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No. 99-1424

IN THE
SUPREME COURT OF THE UNITED STATES

**QUENTIN WILSON, DIRECTOR
DEPARTMENT OF REVENUE OF THE STATE OF MISSOURI,
Petitioner,**

v.

**BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,
Respondent.**

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent restates the Question Presented as follows:

Does Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501, prohibit the imposition of a sales and use tax on railroad diesel fuel, when no other type of carrier is subject to the same tax imposed in the same way on its fuel?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

Burlington Northern Santa Fe Railway Company is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a publicly held corporation. Burlington Northern Santa Fe Railway Company's nonwholly-owned subsidiaries are:

Alameda Belt Line
The Belt Railway Company of Chicago
Central California Traction Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
MT Properties, Inc.
Oakland Terminal Railway
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
St. Joseph Terminal Railroad Company
Sunset Railway Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
TTX Company
Wichita Union Terminal Railway Company

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OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. NO. 94-210 (1976) ("Section 306"), now codified at 49 U.S.C. § 11501. Section 306(1)(d), the specific subdivision applicable in this case, prohibits the imposition of "any other tax that discriminates against common carriers by rail." The same provision as codified, § 11501(b)(4), states that a state, subdivision of a state, or authority acting for a state or subdivision, may not impose "another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." Although the language of Section 306 as codified differs slightly from the language of Section 306 as originally enacted, the codification was not intended to make any substantive change to the meaning of Section 306.

STATEMENT OF THE CASE

The Respondent amends and expands upon the Petitioner's Statement of the Case as follows:

This case is a civil action seeking injunctive and declaratory relief from the Petitioner, Director of Revenue of the State of Missouri ("Director"), seeking to enjoin him from assessing, levying, or collecting sales and use taxes imposed on Respondent Burlington Northern Santa Fe Railway Company ("BNSF") on fuel used in its transportation business in the State of Missouri. BNSF contended that these taxes violate Section 306(1)(d).

Missouri imposes sales tax on the gross receipts from selling, leasing, or renting certain tangible items at retail, or

from providing certain taxable services in Missouri. Missouri also imposes a use tax that complements and is similar to the sales tax. Missouri sales and use taxes are generally based on the retail price of the taxable item or service. The Missouri sales and use tax rate is 4.225% of the retail price for most taxable items. (An additional state use tax rate of 1.5% was repealed in 1996.)

The sale or consumption of petroleum products in Missouri may be subject to either the fuel excise taxes imposed by RSMo. Chapter 142, or to sales and use taxes imposed by RSMo. Chapter 144. Railroads are subject to Missouri sales and use taxes on their diesel fuel and gasoline used within the State of Missouri. Missouri sales and use taxes are also imposed on purchases of aviation jet fuel. Before the repeal of the state additional use tax rate of 1.5%, however, aviation jet fuel was exempt from that additional rate. Air carriers are still exempt from any state or local sales or use tax imposed after December 30, 1987, and from any increase in any state or local sales or use tax rate which was not in effect as of December 30, 1987, on the purchase, storage, or use of aviation jet fuel at any Missouri airport which receives or is eligible to receive federal grant funds. RSMo. § 144.809. In addition, interstate common carriers by air that have a direct pay agreement with the Department of Revenue pay a maximum aggregate amount of $1.5 million of state sales and use taxes in each calendar year. Finally, as of September 1, 1998, all sales and use tax revenues upon aviation jet fuel up to a total of $5,000,000 in a calendar year are deposited into the aviation trust fund. RSMo. § 144.805(4). This trust fund is to be used for the planning, acquisition, construction, improvement, or maintenance of airports, or for other aeronautical purposes. RSMo. § 305.230.

Sales of fuel consumed or used by ships, barges, or vessels that primarily transport property, cargo, or persons for hire on navigable rivers bordering on or located in part in Missouri are exempt from sales and use taxes if the fuel is delivered by the seller to the purchaser's vessel while it is on the river. Fuel used by ships and barges is also not subject to the excise taxes on fuel, since it is not used on the highway. Therefore, none of the fuel used by ships and barges in foreign or interstate transportation is subject to taxation.

RSMo. Chapter 142 imposes petroleum excise taxes on motor fuel (gasoline) and "special fuel" (a statutory term that includes diesel fuel, liquefied petroleum gas, and other similar substances) sold for use in propelling motor vehicles on the highway. The motor fuel and special fuel taxes were imposed at the rate of 15¢ per gallon as of April 1, 1994, and 17¢ per gallon as of April 1, 1996. Proceeds of the motor fuel and special fuel excise taxes are paid into the state highway fund.

BNSF owns its rights-of-way in Missouri. It must build its own tracks, and then maintain and repair those tracks at its own expense. In addition to the sales and use taxes BNSF pays on its fuel, BNSF must pay sales and use taxes on the purchase and installation of all of the materials it uses to maintain and repair its track structure. Because BNSF owns its own track structure, as well as the roadbed on which it is built, BNSF is fully subject to ad valorem taxes on that property in the State of Missouri.

BNSF's principal transportation competitors are motor carriers and barge lines. Air carriers also compete with railroads such as BNSF, but to a lesser extent. Motor carriers, barge lines, and air carriers do not acquire, construct, maintain,

and pay ad valorem taxes on the rights-of-way they use for transportation purposes.

Based on these facts, most of which were stipulated by the parties, both parties filed motions for summary judgment in the district court. The district court issued its ruling on November 20, 1998, granting the Director's motion for summary judgment and denying BNSF's motion. The court ruled that use of tax proceeds could not be considered when determining whether a tax discriminated against a railroad in violation of Section 306. When consideration of the use of tax proceeds was eliminated from the case, the court found that the tax was not discriminatory when analyzed using a "competitive mode" comparison class. The court ruled further that exemptions from a generally applicable tax could never constitute discrimination under Section 306. BNSF appealed this decision to the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit reversed, holding that Missouri's sales and use taxes as imposed on railroad diesel fuel did in fact result in discriminatory treatment of a common carrier by rail, and thus violated Section 306(1)(d). The Eighth Circuit ruled that there was no comparison class specified by Congress for cases brought under Section 306(1)(d), and that therefore the courts could use the comparison class most appropriate to test the specific discrimination being alleged in the case. In this case, the Eighth Circuit found that the most appropriate comparison class was a class composed of competing transportation modes. The court further ruled that it did not need to address the entire taxing structure of the State of Missouri, but rather could confine its analysis to the specific tax at issue, the sales and use tax. Under this analysis, the Eighth Circuit held that Missouri's sales and use tax on railroad

diesel fuel resulted in discriminatory treatment of a common carrier, and therefore violated Section 306(1)(d).

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. BNSF respectfully submits that the Petition should be denied.

1. No Special or Important Reasons Exist for Granting the Writ

a. The Comparison Class Issue Has No Application Beyond Cases Brought Under Section 306(1)(d)

The Director cites three reasons for this Court to grant certiorari in this case. Of the three reasons, only one concerns an actual conflict between the decision of the Eighth Circuit and the decision of another Court of Appeals, and that issue hardly rises to the level of seriousness or importance which would require the intervention of this Court.

In this case, the Eighth Circuit expressly disagreed with the Ninth Circuit regarding which comparison class should be used in testing for discrimination in a non-property tax case brought under Section 306(1)(d). *See* Appendix to Petition at A-4, 5; *Atchison, Topeka & Santa Fe Railway Co.*, 78 F.3d 438 (9th Cir.), *cert. denied sub nom. Arizona Central R.R. v. Arizona*, 519 U.S. 1029 (1996). This question, however, is simply a matter of statutory interpretation concerning one subsection of Section 306. The Eighth Circuit ruled that Congress did not mandate any specific comparison class to be used under Section 306(1)(d), as opposed to the "other

commercial and industrial property" comparison class to be used under Sections 306 (1)(a), (b), and (c). Therefore, "the comparison class should be appropriate to the type of tax and discrimination challenged in a particular case." Appendix to Petition at A-4.

In this case, the Eighth Circuit noted that railroad companies in Missouri are subject to a generally imposed non-property tax, while their direct competitors are not. Appendix to Petition at A-5. Because this placed railroads at a competitive disadvantage with other carriers, the court determined that the most appropriate comparison class would be the railroads' competing transportation modes. It then applied the stipulated facts of the case at hand to the statutory provision, and made its ruling.

This ruling has no precedential effect outside of railroad tax cases. The statutory provision involved, Section 306(1)(d), has no additional application. In addition, Section 306(1)(d) is not the model for any other statute.[1] Therefore, the Eighth Circuit's decision applies to a very small category of cases, with no impact on the vast majority of other taxpayers or other litigants.

Even if the decision were wrong, therefore, this case does not present the type of serious issue of national import that would justify this Court's grant of certiorari. In addition, however, the Eighth Circuit's decision is correct. Section 306 contains four substantive subsections prohibiting discriminatory taxation. Three of those subsections deal exclusively

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[1] Neither the anti-discrimination statute applicable to air carriers, 49 U.S.C. § 40116(d), nor the anti-discrimination statute applicable to motor carriers, 49 U.S.C. § 14502, contains a provision analogous to Section 306(1)(d).

with property taxes, and include reference to a specific comparison class, "other commercial and industrial property." The fourth, Section 306(1)(d), prohibits "any other tax" which results in discriminatory taxation of a railroad, and does not state what comparison class should be used.

In *Santa Fe v. Arizona*, the Ninth Circuit erroneously analogized Section 306(1)(d) to the three property tax provisions, Sections 306(1)(a), (b), and (c). Based on the "other commercial and industrial property" comparison class used in those three subsections, the Ninth Circuit chose to create a new comparison class for cases brought under Section 306(1)(d): other commercial and industrial taxpayers *subject to the same tax*. That comparison class, of course, does not appear anywhere within the text of Section 306, and is contrary to the overwhelming weight of other authorities who have discussed the comparison class issue.

The *Santa Fe v. Arizona* decision includes a strong dissent which concisely shows why there is no problem harmonizing non-property tax cases using the competitive mode class with property tax cases subject to the "other commercial and industrial property" comparison class. Unlike the two-judge majority, the dissenting judge refused to "provide for an exclusive comparison class under Section 306(1)(d) when *Congress explicitly chose not to do so.* Finding that Section 306(1)(d) only permits the broad comparison class does not interpret the 4-R Act, but amends it." 78 F.3d at 445 [emphasis added]. In other words, by creating a mandatory and exclusive comparison class for use in cases brought under Section 306(1)(d), the court actually rewrote the statute, adding new language that does not appear in the statute as Congress enacted it.

The analysis used by the Eighth Circuit in this case has been adopted by other courts confronting the issue of railroads being taxed disadvantageously compared to their direct competitors. *See, e.g., Burlington Northern R.R. Co. v. Commissioner of Revenue*, 606 N.W.2d 54 (Minn. 2000); *Burlington Northern R.R. v. Commissioner*, 509 N.W.2d 551 (Minn. 1993); *Atchison, Topeka & Santa Fe Ry. Co. v. Bair*, 338 N.W.2d 338 (Iowa 1983), *cert. denied*, 464 U.S. 1671 (1984); *Burlington Northern R.R. Co. v. Triplett*, 682 F.Supp. 443 (D. Minn. 1988); *National Railroad Passenger Corp. v. State Board of Equalization*, 652 F.Supp. 923 (N.D. Cal. 1986). Therefore, the Eighth Circuit's decision in this case is in accord with the great weight of authority.

As the Eighth Circuit correctly pointed out in this case, when applying Section 306(1)(d), the focus must be on the resulting discrimination. BNSF's major non-railroad competitors do not pay comparable sales and use taxes on fuel they use in their transportation businesses. This puts railroads at a direct competitive disadvantage, thus resulting in discriminatory treatment of common carriers by rail. The Eighth Circuit has correctly applied the law in this case, and its decision should remain undisturbed.

b. Neither Congress Nor the Eighth Circuit Has Limited the States' Taxing Authority

The Eighth Circuit held in this case that it could limit its analysis in this case to sales and use taxes. The Director now claims that this ruling has "eliminated" the states' ability to structure taxation to address differences among competitors. This overwrought argument ignores both this Court's rulings on when it is appropriate to make comparisons between

different types of taxes, and the actual nature of the taxes at issue in this case.

Motor carriers in Missouri are subject to tax on their motor fuel, but it is a different tax from that paid by railroads, imposed in a different manner, at a different rate, and for a different purpose. The fuel excise taxes paid by motor carriers are used exclusively for the construction and maintenance of highways, which are of course the primary rights-of-way used by the motor carriers. In other words, the fuel excise tax is a user fee, by which the State of Missouri can at least partially collect the cost of its public highways from those who use them. Railroads do not use the public highways, and hence are not subject to the tax.[2] Rather, railroads pay a pure revenue raising tax whose proceeds are paid into the general fund, and in addition must pay to build and maintain (and pay taxes on) their own rights-of-way.

In the courts below, the Director wanted to compare the rate of tax paid by the motor carriers and the railroads, while completely barring any discussion of the vastly different purposes and uses of the fuel excise tax and the sales and use taxes as imposed on fuel. BNSF argued that it was unnecessary to look beyond the sales and use taxes, but that if excise taxes were considered, their nature as "user fees" should be taken into account.

When it refused to look beyond sales and use taxes in this case, the Eighth Circuit was in accordance with decisions of this Court declining to analyze the "entire tax structure" of a state when determining if a specific tax is discriminatory. *See*,

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[2] Railroad companies do pay fuel excise taxes on fuel used in company vehicles that travel on public highways.

e.g., *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 149-50 (1979).

In Commerce Clause cases in which a tax is challenged as an unconstitutional burden on interstate commerce, this Court has sometimes looked to other taxes to determine whether a facially discriminatory tax might be considered non-discriminatory, but it has limited its analysis to taxes which are either "complementary" or "substantially equivalent" to the tax being challenged. Substantial equivalence is a strict test, however, and does not simply involve comparing one tax to another to permit discriminatory taxes to pass constitutional muster.

In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), for example, this Court refused to consider the gross sales tax imposed on Armco as a "compensating tax" for the manufacturing tax imposed on its competitors. Similarly, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), this Court refused to consider a tax on the first use in Louisiana of gas brought in from out of state to be a complement of the severance tax in the same amount imposed on gas produced in the state.

Here, the taxes the Director seeks to compare are sales and use taxes, based on the purchase price of the fuel and used for general revenue purposes, and a fuel excise tax, based on the amount of fuel used and earmarked for the specific purpose of building and maintaining the rights-of-way used by the carriers paying the tax.[3] The two taxes are not complementary or

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[3] Another difference between the taxes is their volatility. The recent dramatic increase in the price of diesel fuel has led to a corresponding dramatic increase in the amount of sales and use taxes paid for the purchase of that fuel, since those taxes are based on the purchase price. The excise

substantially equivalent, and the Eighth Circuit was well within this Court's existing case precedent in refusing to compare the two. This decision breaks no new ground, and imposes no new burdens on state tax planning. Therefore, there are no grounds for this Court to grant certiorari in this case.

2. The Second Asserted "Conflict" Is Not Actually a Conflict

The Director asserts that the Eighth Circuit is in conflict with the Ninth Circuit's interpretation of *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332 (1994), in its *Santa Fe v. Arizona* decision.[4] The *ACF Industries* decision, however, is not applicable to this case.

The specific holding of the *ACF Industries* case is stated as follows:

> We hold that a State may grant exemptions from a generally applicable *ad valorem property tax* without subjecting the taxation of railroad *property* to challenge under the relevant provision of the 4-R Act, § 306(1)(d), 49 U.S.C. § [11501](b)(4).

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tax paid by motor carriers, however, has not varied at all, since it is based on the number of gallons of fuel purchased.

[4] It is interesting to note that the Director never asserts that the Eighth Circuit is in conflict with this Court's decision in *ACF Industries* itself. Rather, he asserts that the Eighth Circuit is in conflict with the Ninth Circuit's interpretation of the *ACF Industries* decision. This simply confirms that the issues decided by this Court in *ACF Industries* are not relevant to this case.

510 U.S. at 335 [emphasis added]. This holding is repeated at the end of the decision:

> We conclude that § [11501], which expresses Congress' resolution of the matter, does not limit the States' discretion to exempt nonrailroad *property*, but not railroad *property*, from *ad valorem property taxes* of general application.

510 U.S. at 347-48 [emphasis added]. The fact that this Court was considering a property tax in that case not only limits the application of the decision, but also was critical to the logic and reasoning leading to the express holding.

ACF Industries was a property tax case that turned on the definition of "other commercial and industrial property," a phrase which is expressly used in Sections 306(1)(a),(b), and (c), but not in Section 306(1)(d). According to Section 306(3)(c), [§ 11501(a)(4)], "commercial and industrial property is "*property*, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and *subject to a property tax levy*." [Emphasis added.] This Court held that the phrase "subject to a property tax levy" meant "taxed property," and did not mean "taxable property, a broader category consisting of the general mass of property within the State's jurisdiction and power to tax, including property that enjoys a current exemption." 510 U.S. at 341. Therefore, this Court concluded, the definition of "commercial and industrial property" excluded property that was statutorily exempt from tax.

Although the *ACF Industries* decision involved a challenge brought under Section 306(1)(d), the tax being challenged was a property tax. This Court reasoned that Congress could not

have intended to exclude exempt property from consideration in property tax cases brought under the three previous subsections of Section 306 only to have it brought back into the mix in a property tax case brought under the broader language of Section 306(1)(d). None of the Court's analysis of this issue makes any sense in the context of a case brought under Section 306(1)(d) that challenges a sales and use tax, or any tax other than an ad valorem property tax.

Whether or not the *ACF Industries* decision has application in non property tax cases is actually unimportant in this case, however. Once the Eighth Circuit decided that it could properly apply the competitive mode comparison class in its analysis, the question of exemptions became irrelevant. If railroads are the only transportation mode subject to the same tax applied in the same manner on transportation fuel, the tax is clearly discriminatory because railroads have been singled out for the imposition of a tax that their competitors do not pay. The Eighth Circuit neither discussed nor decided whether the Ninth Circuit's ruling concerning "exemptions" was correct, because it did not need to reach that issue. Therefore, there is no true conflict, and no reason for this Court to grant the Petition.

CONCLUSION

None of the issues raised in the Petition merit review by this Court. Although there is a technical conflict between the Eighth and Ninth Circuits on the comparison class issue, this is an issue that has no import beyond railroad tax cases brought under one specific subsection of Section 306. The other two issues present no real conflicts and address matters on which the Eighth Circuit's decision is fully within existing precedent. The Petition does not present any ground for granting certiorari

within the meaning of Rule 10 of the Rules of this Court and should be denied.

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